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Case No. 93-162

In The

Supreme Court of the United States

October Term, 1993

ROBERT L. SMITH,

Petitioner,

versus

SCOTT PAPER COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

REPLY BRIEF OF PETITIONER

ANDREW T. CITRIN
(*Counsel of Record*)
ROBERT T. CUNNINGHAM, JR.
DAVID G. WIRTES, JR.
CUNNINGHAM, BOUNDS, YANCE, CROWDER AND BROWN
Post Office Box 66705
Mobile, Alabama 36660
(205) 471-6191

Counsel for Petitioner, Robert L. Smith

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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MISSTATEMENTS IN RESPONDENT'S BRIEF

In its brief in opposition, respondent argues that it "moved for Summary Judgment *primarily* on the ground of *res judicata*". [Respondent's Br. at p. 1]. This assertion is baseless. The *only* ground raised by respondent's motion for summary judgment was that of *res judicata*. [See, Pet. at Appendix A, p. 1a]. At no time did respondent argue the merits of the case before the trial court or the Supreme Court of Alabama, nor did it submit any evidence to support a motion for summary judgment on the merits.

Respondent next misinterprets the February, 1992 letter from Mr. Smith's attorney to the trial judge (appended to respondent's brief). Respondent erroneously states:

> "On February 19, 1992, Mr. Smith's attorney wrote a letter to the trial court requesting that the trial court consider 'evidence' of the merits of Mr. Smith's claims of fraud and outrage against Scott."

As pointed out in Mr. Smith's petition, the *only* purpose of submitting this evidence was to acquaint the trial court with the type of case involved so that the court could appreciate the gravity of the plaintiff's claims. This point is made clear in the February 19, 1992 letter itself:

> "This voluminous evidence was presented so the Court could appreciate that the issues involved in this litigation involve far more than the mishandling of just Robert Smith's workmen's compensation and sickness and accident claims."

[See App. A to Respondent's Br. at A-1-A-2]. Nowhere in the February 19, 1992 letter is there *any* reference to the standard of review on motion for summary judgment, the elements of fraud and the tort of outrage, or the sufficiency of the evidence.

Respondent also argues (Br. at p. 5) that Smith suggested in his petition that the Supreme Court of Alabama impliedly agreed that a due process violation occurred. This is incorrect. Smith simply stated, correctly, that the two most senior members of the Alabama Supreme Court implicitly recognized on rehearing that a due process violation occurred in this case. [*See*, Pet. at p. 2].

REASONS FOR GRANTING THE WRIT

Respondent argues that "Mr. Smith and his counsel had notice that the judgment below might be affirmed on other grounds because a correct judgment rule had been in existence in Alabama for decades". This statement goes to the heart of why the instant petition *should* be granted.

As noted in the petition, there is a patent conflict between the application of the correct judgment rule under the circumstances in this case, and two well-established procedural rules: (1) the rule regarding the shifting of the evidentiary burden on a motion for summary judgment and (2) the rule that an appellate court will not consider matters not raised or decided below. Respondent's brief completely avoids discussion of these conflicts.

Under well-established Alabama law, the evidentiary burden on motion for summary judgment does not shift to the non-moving party unless and until the moving party makes a *prima facie* showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. [*See*, Pet. at p. 14, n. 13]. Here, respondent admits that it submitted no evidence whatsoever to suggest that it was entitled to judgment as a matter of law on the merits of the fraud and outrage claims. Therefore, respondent implicitly admits that the burden never shifted to Smith to come forward with evidence supporting these claims. [*Id.*]. Respondent makes no effort to explain how a court can properly dismiss a litigant's claim for lack of sufficient evidence when, under the court's own procedural rules, that litigant was never under any obligation to submit evidence supporting the claim.

Similarly, the Alabama Supreme Court has repeatedly held that it will not consider matters not raised or decided in the trial court. [*Id.* at n. 14]. Respondent makes no effort to explain why a litigant should expect an appellate court to reach, *sua sponte*, a dispositive issue for the first time on appeal when the court's own decisions prohibit such a practice.

Respondent goes so far as to say (Br. at p. 9): "By its very nature, the correct judgment rule *often, if not always, addresses arguments not made in the trial court.*" (emphasis added). Respondent apparently believes that the Due Process Clause does not apply to appellate courts, state or federal. According to respondent (Br. at p. 9, n. 6), this Court held in *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) that an appellate court may affirm a judgment on any ground it wishes, regardless of "whether or not that ground was relied upon *or even considered* by the court below." *Id.* at 814, n. 12. Respondent interprets the *Arthur Young* case too broadly (as did, apparently, the Alabama Supreme Court).

The Due Process Clause places certain limits upon the application of the correct judgment rule. These limits depend on the nature of the issue to which the appellate court seeks to apply the correct judgment rule. If the disposition of the issue turns upon the affected party's ability to submit evidence to substantiate his claims, then the appellate court should not reach that issue for the first time on appeal, unless that party was given adequate notice and the opportunity to respond. If, on the other hand, the disposition of the issue does not depend on any evidence the affected party might offer, the appellate court may affirm on that ground even though the party

received no notice of that ground (since notice to that party would not affect the outcome).

To illustrate, suppose, in a negligence action by a daughter against her mother, the mother files a motion for a summary judgment solely on the basis of the statute of limitations and contributory negligence. No other issues are raised or even suggested by the mother's motion and no other issues are considered by the trial court. Suppose further that the trial court grants summary judgment solely on the basis of the statute of limitations. Suppose further that the appellate court determines the trial court erred in granting summary judgment on the basis of the statute of limitations. May the court nevertheless affirm the judgment on some other ground? The answer depends upon whether the plaintiff could affect the disposition of that issue through the submission of evidence.

If the issue is one that does *not* turn upon the evidence submitted by the plaintiff, the appellate court may properly affirm, regardless of notice. For example, if the court found that it lacked jurisdiction, the complaint failed to state a claim upon which relief could be granted, the defendant was absolutely immune from suit (i.e., parental immunity), or the daughter lacked capacity to sue, it could affirm even though the daughter received no notice that these issues were before the court. Notice is not necessary with respect to these issues since there would be nothing the daughter could do, even if she was given notice, to change the outcome of the case.

If, on the other hand, the issue is one that *does* turn upon the evidence submitted by the plaintiff, the appellate court should not affirm the judgment *unless* it

appears that the plaintiff was given notice of that issue and the opportunity to present her evidence. The appellate court in the above illustration could affirm the judgment on the basis of contributory negligence, since the plaintiff received notice of this ground and was given the opportunity to respond. However, the court should not affirm summary judgment on the merits of the plaintiff's negligence claims (i.e., duty, breach of duty, proximate cause, and damages) since her claims were not challenged on this basis and she was not given notice of the necessity of submitting her evidence. This is particularly true since without a direct challenge from the defendant and supporting evidence demonstrating her inability to recover, the evidentiary burden never shifted to the plaintiff (because defendant did not challenge her evidence or submit any supporting evidence).

As noted in the petition (at pp. 16-18), the Fifth Circuit Court of Appeals has recognized that, no matter how correct a judgment may be in the end, a court may not dispense with the requirements of due process for the sake of judicial expediency.

> " 'As Judge Goldberg aptly observed of the notice requirement in *Soley v. Star & Herald Co.*, 390 F.2d 364, 369-70 (5th Cir. 1968): "They [the litigants] cannot read over the judge's shoulder, or penetrate his memory. Nor can we. From Shakespeare's Hamlet to Albee's Tiny Alice, soliloquies and asides have been shared with the audience." Where there is a motion to dismiss for failure to state a claim upon which relief may be granted, there can never be a wide overview by the trial court, beyond the pleadings to include matters outside, without affording all litigants the opportunity to offer their

> perspectives on the additional matter by way of admissible evidence.
>
> " 'The bridling devices at issue here sustain and insure the most elementary operation of our civil law. The concepts of notice, admissibility, and opportunity to be heard are ancient primaries. Independent from these notions in advocacy, there is the trial court's duty to insure that its basis for judgment is without error. This duty of the trial court distinguishes the margin of allowances we have held in the instance of an original Rule 56 motion for summary disposition following a Rule 12(b)(6) motion. * * * However correct the conclusion below may be in the end, we cannot allow the shaving of principles for expediency when those precepts assure order and justice.' "

Davis v. Howard, 561 F.2d 655, 672 (5th Cir. 1977).

Hence, Smith does not argue that the correct judgment rule is unconstitutional *per se*. Smith argues *only* that before an appellate court may apply the correct judgment rule to affirm a judgment on a ground not raised or decided below, it must ensure that the affected party received adequate notice and an opportunity to be heard on that ground. Contrary to respondent's suggestions, this requirement will not "eviscerate" the correct judgment rule or "set aside long-standing precedent in Alabama and every other jurisdiction". It will simply ensure that litigants are afforded notice and an opportunity to be heard before appellate courts entertain dispositive issues for the first time on appeal.

Respondent argues (Br. at p. 7) that "since Mr. Smith specifically requested that this 'evidence' relating to the merits of his claim be part of the record on appeal, it is

obvious that Mr. Smith knew or should have known that the Supreme Court of Alabama could review and consider the evidence in reaching its decision". This argument is simply incorrect because none of the Alabama Supreme Court's prior decisions invoking the correct judgment rule involved circumstances similar to this case. Respondent cites *Boykin v. Magnolia Bay Inc.*, 570 So.2d 639 (Ala. 1991) for the proposition that the Alabama Supreme Court there affirmed summary judgment on the merits even though the merits were not raised in the trial court. However, the opinion clearly reveals that the merits of the case were raised in the trial court.

In *Boykin*, a minor child and her parents brought claims for the tort of outrage against an abortion clinic for performing an abortion on the child without parental consent, as required by statute. The trial court had held that the parents' claim was derivative of their minor child's and that, since their minor child's claim was barred by the doctrine of *in pari delicto*, the parents' claim was also barred. On appeal, the Alabama Supreme Court ruled that the doctrine of *in pari delicto* did not apply to the parents' claim and that the parents' claim was not derivative of their minor child's. Nevertheless, the court affirmed summary judgment because the parents could not, *under any circumstances*, recover on their claim for outrage, since they indisputably were not physically present when the abortion was performed.[1] *Id.* In essence, the court affirmed the case on the basis of an issue that did not turn on the evidence submitted by the parents,

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[1] Under Alabama law, one must be physically present when the offensive conduct occurs to recover for outrage.

i.e., no amount of evidence submitted by the parents on the merits could change the fact that they were not present when the alleged outrageous conduct occurred. Moreover, it appears from the decision that the defendant abortion clinic had filed a *general* motion for summary judgment, giving the parents notice that their claims were challenged on the merits.

This is drastically different from what occurred in this case. Here, the Alabama Supreme Court affirmed on the basis of an issue which turns entirely on the evidence Smith might submit, without giving him the slightest notice or opportunity to submit his evidence.

Respondent seems to argue that because Smith submitted more evidence than necessary to respond to the *res judicata* issue, he *unwittingly* converted respondent's limited motion for summary judgment into a general motion for summary judgment on the merits. This argument ignores the Due Process Clause's requirements of fair notice and opportunity to be heard. As noted, Smith did not submit the evidence in the trial court to prove the merits of his claims. He had no reason to suspect that the trial court might rule on the merits and, in fact, the trial court did not.[2] Smith certainly never attempted to submit

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[2] The trial court granted respondent's motion for summary judgment solely on the basis of res judicata. In granting summary judgment, the trial court expressly stated that it did "not weigh the evidence alleged to support the claims made in the second [instant] lawsuit. . . . " [Pet at App. B, p. 2a]. The trial court's entire order deals *exclusively* with the applicability of the doctrine of res judicata. [*Id.* at 2a-9a].

all of his evidence. If Scott had filed a motion for summary judgment on the merits, and had submitted sufficient evidence to shift the evidentiary burden to Smith, Smith would have been given an opportunity to submit whatever evidence he could to rebut the motion for summary judgment. However, because respondent never filed such a motion for summary judgment and never submitted such evidence, Smith was never given notice and the opportunity to respond. By the time Smith first learned that the merits of his claims were being reviewed, the Alabama Supreme Court had already decided the case and it was too late for Smith to submit the evidence he had supporting his claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANDREW T. CITRIN
Counsel of Record

ROBERT T. CUNNINGHAM, JR.
DAVID G. WIRTES, JR.
CUNNINGHAM, BOUNDS, YANCE,
CROWDER AND BROWN
Post Office Box 66705
Mobile, Alabama 36660
(205) 471-6191

Counsel for Petitioner,
Robert L. Smith